

1 UNITED STATES BANKRUPTCY COURT  
2 IN AND FOR THE DISTRICT OF ARIZONA

3 In Re )

Chapter 13 Proceedings

4 ARTHUR J. GAMACHE and )  
5 PRISCILLA C. GAMACHE, )

Case No. BK 05-6956-PHX-CGC

6 Debtors. )

Adv. No. 05-578

7 WILLIAM DOUGLAS MORLEY and )  
8 ROSEMARIE A. MORLEY, husband )  
and wife, )

UNDER ADVISEMENT DECISION  
RE: DISCHARGEABILITY

9 Plaintiffs, )

10 v. )

11 ARTHUR J. GAMACHE and, )  
12 PRISCILLA C. GAMACHE, )

13 Defendants. )

14 Plaintiffs William and Rosemarie Morley ("Morley") seek summary judgment against  
15 Debtors Arthur and Priscilla Gamache ("Gamache") arising out of Plaintiffs' purchase of a  
16 motorcycle from Debtors in 2004.

17 The facts are undisputed. Gamache sold a motorcycle to Morley for the negotiated price  
18 of \$4,300.00. When the parties met to consummate the transaction, Morley had only \$3,300  
19 with him and Gamache had brought the wrong title. The parties agreed to treat the \$3,300 as a  
20 deposit. Morley left with the motorcycle and Gamache agreed to get the right title and meet at a  
21 later point to finish the transaction.

22 Before it was possible to finish the transaction, Morley seriously injured himself while  
23 riding the motorcycle. The cycle was totaled and Morley fell into a coma. According to  
24 Gamache, Rosemarie Morley called and asked Gamache "to deal with the motorcycle," as the  
25 towing company was repeatedly calling her to have her pay to release the motorcycle. Gamache  
26 thereafter made a claim on his insurance policy. The insurer paid Gamache \$5,400 and paid the  
27 towing company, thereby releasing the motorcycle. In the end, Gamache received \$5,400 from  
28 the insurance company plus the \$3,300 Plaintiffs had paid as a deposit.

1 Gamache, unhappy with Morley's conduct during the transaction, offered to return only  
2 half of the \$3,300 Morley had paid. Although Gamache apparently believed he was entitled to  
3 keep the entire \$3,300, the Court concludes that, outside of bankruptcy, the motorcycle would be  
4 treated as theirs (as they collected the insurance payment arising from the damage to the cycle)  
5 and that they owe the deposit back to Morley.

6 Subsequently, Gamache filed bankruptcy and Morley filed this adversary seeking a  
7 determination that the \$3,300 debt is non-dischargeable. In the absence of such a  
8 determination, the debt would be discharged.

9 Morley's counsel cites to both Sections 523(a)(2) and (4) as grounds for finding the  
10 debt nondischargeable. Section 523(a)(2)(A) requires a finding that the debt was incurred by  
11 "false pretenses, a false representation, or actual fraud." Morley provides no analysis or proof  
12 that the debt was incurred by fraud or false pretenses. According to Gamache, he believed they  
13 were entitled to keep the \$3,300 because Morley allegedly "nickel and dimed" them over the  
14 purchase price and made false claims that the motorcycle was defective in an effort to further  
15 reduce the sales price. Whether ultimately true or not, Morley does not challenge Gamache's  
16 stated intent and has provided no evidence to the contrary.

17 Plaintiffs' second ground for finding the debt nondischargeable is Section 523 (a)(4),  
18 which requires a finding that the debt was incurred by "fraud or defalcation while acting in a  
19 fiduciary capacity, embezzlement, or larceny." Defalcation while acting in a fiduciary  
20 capacity further requires proof of an actual trust, rather than a resulting or constructive trust.  
21 *See In re Schneider*, 99 B.R. 974 (9<sup>th</sup> Cir. BAP 1989) (stating that "[t]he intent to create a trust  
22 relationship rather than a contractual relationship is the key element in determining the  
23 existence of an express trust."). Simply holding the \$3,300 deposit until Plaintiffs could pay  
24 the remaining amount does not give rise to an actual trust.


25 Although not argued in their complaint or motion for summary judgment, Plaintiffs'  
26 real claim is that Gamache converted either the cycle or the insurance proceeds, thereby  
27  
28

1 implicating Section 523(a)(6). Under prior Ninth Circuit law, conversion may have been  
2 grounds for a finding of nondischargeability under 523(a)(6). *See In re Cecchini*, 772 F.2d  
3 1493 (9<sup>th</sup> Cir. 1985). However, that is no longer the case. In *Kawaauha v. Geiger*, 523 U.S.  
4 57 (1998), the United States Supreme Court settled a dispute among the circuits as to the  
5 meaning of “wilful and malicious injury” by determining that a finding of evil intent was a  
6 necessary predicate to “wilful or malicious injury.” Under *Geiger*, the debtor must have  
7 intended the consequences of his act and not simply the act itself. Therefore, negligently or  
8 recklessly inflicted injuries do not fall within the meaning of “wilful or malicious.” The Ninth  
9 Circuit, by which this Court is bound, has consistently held since *Geiger* that conversion is not  
10 *per se* a wilful and malicious injury to property of another. *See In re Peklar*, 260 F.3d 1035  
11 (9<sup>th</sup> Cir. 2001); *In re Thiara*, 285 B.R. 420 (9<sup>th</sup> Cir. BAP 2002). The question is one of intent,  
12 a fact question difficult to determine on summary judgment. Here, Debtors have stated that  
13 their reason for keeping the funds was their belief that they were entitled to them as a result of  
14 the trouble they felt they went through in trying to consummate this sale. The record is devoid  
15 of any evidence of intent to harm Gamache, although Morley has not yet had the opportunity to  
16 make that case.

17 For the foregoing reasons, the Motion for Summary Judgment will be denied.  
18 Plaintiffs shall have thirty days within which to amend their complaint to state a cause of action  
19 under Section 523(a)(6). If the complaint is so amended, Gamache’s previous answer will be  
20 treated as an answer to the amended complaint and a Rule 16(b) scheduling conference will be  
21 set, at which time a date for trial will be determined. If the amended complaint is not filed,  
22 judgment will be entered for Gamache.

23 So ordered.

24 DATED: February 5, 2007

25   
26 CHARLES G. CASE II  
27 United States Bankruptcy Judge  
28

1 **COPY** of the foregoing mailed by the BNC and/or  
2 sent by auto-generated mail to:

3 **OFFICE OF THE U.S. TRUSTEE**  
4 230 N. First Ave.  
5 Phoenix, Arizona 85004

6 Keith R. Lallis  
7 Gibson, Mathesin, Lallis, & Friedlander  
8 1837 S. Mesa Dr., Ste. C100  
9 Mesa, Arizona 85210-6219  
10 Attorneys for Plaintiffs

11 Arthur and Priscilla Gamache  
12 11170 W. Holly Street  
13 Avondale, Arizona 85323  
14 Defendants/Debtors

15 James L. Leather  
16 Burton & Associates  
17 13601 N. 19<sup>th</sup> Avenue, Ste 5  
18 Phoenix, Arizona 85029  
19 Attorneys for Defendants/Debtors